

**STATE OF CALIFORNIA**  
**OFFICE OF ADMINISTRATIVE LAW**

2008 MAY 19 PM 4:12

**2008 OAL DETERMINATION NO. 6**  
**(OAL FILE # CTU 2007-1113-01)**

**REQUESTED BY:** Shelley Alarid

**CONCERNING:** Department Of Personnel Administration – Personnel Management  
Liaison Memorandum 2005-024 (PML 2005-024) - Six Month  
Limitation of Retroactive Dental Premium Reimbursements.

**DETERMINATION ISSUED PURSUANT TO**  
**GOVERNMENT CODE SECTION 11340.5.**

**SCOPE OF REVIEW**

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600<sup>1</sup> and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.<sup>2</sup> OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

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<sup>1</sup> Government Code 11342.600:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

<sup>2</sup> An underground regulation is defined in title 1, California Code of Regulations, section 250:

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

## **ISSUE**

On November 13, 2007, Ms. Alarid submitted a petition to OAL challenging rules issued in a memorandum by the California Department of Personnel Administration (Department) as underground regulations issued in violation of Government Code section 11340.5.<sup>3</sup> The alleged underground regulations are contained in Personnel Management Liaison Memorandum 2005-024 (PML 2005-024), issued by the Department's Benefits Division, addressed to "Personnel Officers, Personnel Transaction Supervisors and Personnel Transactions Staff." The subject of PML 2005-024 is "Six Month Limitation of Retroactive Dental Premium Reimbursements."

## **DETERMINATION**

OAL determines that PML 2005-024 meets the definition of a "regulation" as defined in section 11342.600 and that it should have been adopted pursuant to the APA.

## **FACTUAL BACKGROUND**

PML 2005-024 was issued on August 9, 2005. It is attached to this determination as Attachment #1. It states, in part:

Effective January 1, 2006, retroactive premiums for mandatory cancellations and/or deletions to employees' dental coverage will be reimbursed for a maximum period of six months.

Ms. Alarid states that the Department has denied her request for reimbursement of retroactive dental benefits she paid after her son was no longer eligible for coverage in July 2005, until September 2007 based upon enforcement of PML 2005-024. Because of the enforcement of PML 2005-024, Ms. Alarid has been limited to six months of reimbursement only.

In its response to the petition, the Department asserts that: (1) PML 2005-024 is exempt from the rulemaking requirements of the APA; (2) the Department was not acting in a quasi-legislative manner when it issued PML 2005-024; and (3) state employees were given ample notice of the change, and therefore, all safeguards associated with the APA have been met.

Ms. Alarid did not provide a rebuttal to the Department's response.

## **UNDERGROUND REGULATIONS**

Section 11340.5, subdivision (a), prohibits a state agency from issuing a rule unless the rule complies with the APA. It states as follows:

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<sup>3</sup> Unless otherwise specified code references are to the California Government Code.

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

### ANALYSIS

A determination of whether the challenged rule is a "regulation" subject to the APA depends on (1) whether the challenged rule contains a "regulation" within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 as:

. . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 571, the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. PML 2005-024 states that all California state employees will only be able to recover a maximum of six months of retroactive dental premiums paid for state-sponsored dental coverage. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. PML 2005-024 applies to such a clearly defined class of persons: employees of the state of California with state-sponsored dental coverage. The first element is, therefore, met.

The second *Tidewater* element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. Government Code sections 22950-22959 is the State Employees' Dental Care Act. Government Code section 22953, subdivision (a), provides that:

The state, through the Department of Personnel Administration...may contract, upon negotiations with employee organizations, with carriers for dental care plans for employees, annuitants, and eligible family members....

Government Code section 22959 states:

The Department of Personnel Administration shall administer the benefits provided by this part for civil service employees and annuitants....

The Department's rule in PML 2005-024, allowing reimbursement for only six months of retroactive premiums for state-sponsored dental coverage, directly affects "...the benefits provided by this part [State Employee Dental Care Act] for civil service employees and annuitants...." (Gov. Code, sec. 22959.) This rule has a direct impact on state employees with state-sponsored dental coverage by establishing a maximum period of reimbursement of dental premiums. Thus, PML 2005-024 implements, interprets, or makes specific section 22959. The second element in *Tidewater* is met; therefore, OAL concludes the challenged rule in PML 2005-024 meets the definition of "regulation."

The final issue to examine in determining if the Department has created an underground regulation by issuing PML 2005-024 is whether PML 2005-024 falls within an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies.<sup>4</sup> Exemptions may also be specific to a particular rulemaking agency or a specific program.<sup>5</sup> Pursuant to section 11346, the rulemaking procedures required by the APA "shall not be superseded or

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<sup>4</sup> See Government Code section 11340.9.

<sup>5</sup> For example, Penal Code section 5058.1 that exempts pilot programs within prisons and Education Code section 89030 that exempts rules and regulations adopted by California State University trustees from compliance with the APA.

modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” We find no exemptions from the APA that would apply to PML 2005-024, and do not agree with the Department’s assertion that it is exempt. Our reasons for not agreeing with the Department’s argument follow.

### 1. Department Asserts PML 2005-024 is Exempt

The Department asserts that PML 2005-024 is exempt from the rulemaking requirements of the APA pursuant to section 11340.9(c).<sup>6</sup> Section 11340.9(c) provides an exemption to the APA for instructions relating to the use of a form prescribed by a state agency. The Department cites *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, as holding that

...[the administrative bulletins used for] the implementation of a new standardized scoring system to achieve inmate classifications, formally determined on a subjective basis, brought about a wholly new and different scheme affecting the placement and transfer of prisoners, and thus did not fall within the statutory exemption for operational forms.<sup>7</sup>

The Department argues that PML 2005-024 simply instructs employees completing the Dental Plan Enrollment Authorization form (STD. 692) that they can only recover six months worth of retroactive dental premiums from the date of the form and is therefore exempt from the APA pursuant to section 11340.9(c). The Department asserts that the PML 2005-024, as distinguished from the administrative bulletins in *Stoneham*, does not present a wholly new and different scheme affecting state employees because they were already subject to an identical limitation for health care premiums.<sup>8</sup>

The existing scheme to which the Department refers is section 599.502(f)(2) of title 2 of the California Code of Regulations (CCR). Section 599.502(f)(2) was adopted by the Public Employees Retirement System (CalPERS) implementing the Public Employees' Medical and Hospital Care Act (section 22750). This properly adopted regulation applies only to health care premiums and not dental premiums. The fact that CalPERS has a regulation that establishes a limitation on the reimbursement of excess health care

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<sup>6</sup> 11340.9(c) states that the APA does not apply to the following:

A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued.

<sup>7</sup> Department's Response to Petition, p. 2.

<sup>8</sup> Title 2, California Code of Regulations, section 599.502(f)(2)(C):

...When a mandatory change of enrollment results in a retroactive cancellation or deletion of enrollment and creates a difference in premium based on the date a family member became ineligible for coverage and the date an employee or annuitant changed his or her enrollment to delete the ineligible family member, the employer and employee or annuitant may receive a refund. **The amount of the refund shall not exceed those excess premiums paid for a period of up to six months prior to the date on which the action is processed and recorded, pursuant to the employee's or annuitant's request for retroactive cancellation or deletion of the ineligible family member.** (Emphasis added.)

premiums paid does not mean that the Department has the authority to enforce a similar rule concerning dental premiums without going through the APA rulemaking process. If OAL were to accept this argument by the Department, the Department would be able to use any regulation adopted by any other state agency that affects state employees without going through the APA rulemaking process. Government Code section 11340.5(a), however, prohibits a state agency from doing exactly that.

The Department also states that PML 2005-024 “was issued to **instruct** employees completing a Dental Plan Enrollment Authorization (STD. 692) that they will not be able to recover any premiums deducted from their monthly pay prior to six months from the date that the form is completed.” (Emphasis added.) Section 11340.9(c) provides that “any instructions relating to the use of a form” are exempt from the rulemaking requirements of the APA. Section 11340.9(c) continues, however, that “... this provision is not a limitation on any requirement that a regulation be adopted pursuant to [the APA] when one is needed to implement the law under which the form is issued.” A rule stating that employees will not be able to recover any dental premiums deducted from their monthly pay prior to six months from the date that the form is completed does not constitute “instructions” to employees on the use of the form, i.e., how to fill it out, or explain what it is used for. The PML 2005-024 was issued to “inform” state employees of the rule that there is a six-month limitation on reimbursement of excess dental premiums paid. As found above, the PML 2005-024 rule is a general rule that implements, interprets, or makes specific section 22959. It does not constitute instructions relating to the use of a form, and therefore, does not fall within the “forms” exemption of 11340.9(c).

## 2. Department Asserts Its Action Was Not Quasi-Legislative

The second assertion by the Department is that it was not acting in a quasi-legislative manner when it issued PML 2005-024 and that instead it was merely applying and/or interpreting an existing regulation, title 2 CCR section 559.502(f)(2)(C), as well as provisions found in a Memorandum of Understanding (MOU)<sup>9</sup> and thereby acting in its role as administrator of State Employee Dental Plans pursuant to section 22959. Since the term “quasi-legislative” is not defined in the California APA, we look to the judicial definition of the term to determine whether the challenged action reflects the exercise of quasi-legislative power. *Tidewater* states that “A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law.”<sup>10</sup> Using this definition of quasi-legislative, the rule found in PML 2005-024 contains a written statement of policy that the Department intends to apply generally to state employees with dental care coverage and predicts how

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<sup>9</sup> A Memorandum of Understanding is an agreement reached pursuant to the Ralph C. Dills Act (“Dills Act”). The Dills Act sets forth the statutory law governing relations between the state and its employees. One purpose of the Dills Act is “...to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations.” Government Code section 3512.

<sup>10</sup> *Id.* at 574-575

the Department will decide future cases. Therefore, it is a quasi-legislative action on the part of the Department and is subject to the APA.

Turning now to the argument that PML 2005-024 is merely an application of an existing regulation, it is necessary to look at the regulation in question, title 2, California Code of Regulations section 599.502(f)(2)(C). Section 599.502(f)(2)(C) states:

When a mandatory change of enrollment results in a retroactive cancellation or deletion of enrollment and creates a difference in premium based on the date a family member became ineligible for coverage and the date an employee or annuitant changed his or her enrollment to delete the ineligible family member, the employer and employee or annuitant may receive a refund. **The amount of the refund shall not exceed those excess premiums paid for a period of up to six months prior to the date on which the action is processed and recorded, pursuant to the employee's or annuitant's request for retroactive cancellation or deletion of the ineligible family member.** (Emphasis added.)

Section 599.502(f)(2)(C) was adopted by the California Public Employees Retirement System to implement, interpret or make specific the Public Employees' Medical and Hospital Care Act (section 22750). In contrast, the challenged rule in PML 2005-024 implements, interprets or makes specific section 22959 of the State Employees' Dental Care Act. The Department's application of a CalPERS health care regulation to dental benefits administered by the Department does not constitute a mere restatement of law. The CalPERS regulation does not apply to dental premiums, nor was it adopted by the Department.

The Department also argues that PML 2005-024 merely interprets preexisting provisions found in MOU's. The Department points to the MOU for Bargaining Unit 4, "...Section 9.2(B) of Bargaining Unit 4's MOU states: 'Employee eligibility for dental benefits is the same as that prescribed for health benefits under section 9.1 of this Contract.' Section 9.1(D) of Bargaining Unit 4's MOU states: 'Employee Eligibility - for purposes of this section, 'eligible employee: shall be defined by the Public Employee's Medical and Hospital Care Act.'" <sup>11</sup> The Department states that this language or similar language exists in all state MOU's. However, the issue, here, is not *eligibility* for benefits, but rather the ability of state employees to recover retroactive dental premiums. Even if OAL were to accept the assertion that the language in the MOU exists in all MOU's, it is unclear how *eligibility* for health care or dental insurance relates to the rule that limits employees' ability to receive retroactive dental premiums to a period of six months. OAL finds that the rule stated in PML 2005-024 is not a restatement of existing law.

### 3. Department Asserts Notice Given Satisfies APA

Finally, the Department argues that even if OAL finds that PML 2005-024 is a regulation within the meaning of the APA, all of the safeguards of APA rulemaking requirements

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<sup>11</sup> Department's Response to Petition, p. 3, fn 2.

were met because employees were given ample notice of the limitation on dental premium reimbursement. PML 2005-024 was issued five months before its effective date and the Department states that it did not receive any "feedback" from employees concerned with the six month limitation. We reject the assertion that issuing a memo five months prior to a change in policy and posting the document on a departmental webpage constitutes compliance with the requirements of the APA. As *Tidewater* states:

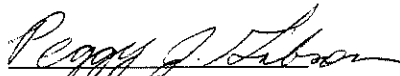
The APA establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov.Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov.Code, § 11346.2, subds.(a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov.Code, § 11346.8); respond in writing to public comments (Gov.Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov.Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov.Code, §§ 11349.1, 11349.3).

The Department did not comply with the rulemaking procedures established by the APA. The mere issuance of PML 2005-024 does not provide the notice required by sections 11346.4 and 11346.5 nor does it afford the public the opportunity for a hearing pursuant to section 11346.8(a). PML 2005-024 was not reviewed or approved by OAL. The Department failed to satisfy in whole or in part the requirements of APA rulemaking in any substantive manner when it issued PML 2005-024.

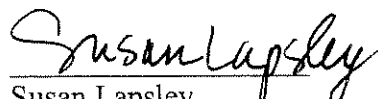
### CONCLUSION

PML 2005-024 meets the definition of a "regulation" as found in section 11342.600, does not fall within any express APA exemption, and therefore, it should have been adopted pursuant to the APA.

Date: May 19, 2008

  
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Susan Lapsley  
Director



**Department of Personnel Administration  
Memorandum**

**TO: Personnel Management Liaisons (PML)**

<b>SUBJECT:</b> Six Month Limitation of Retroactive Dental Premium Reimbursements	<b>REFERENCE NUMBER:</b> 2005-024
<b>DATE ISSUED:</b> 08/09/05	<b>SUPERSEDES:</b>

This memorandum should be forwarded to:

**Personnel Officers  
Personnel Transaction Supervisors  
Personnel Transactions Staff**

**FROM:** Department of Personnel Administration  
Benefits Division

**CONTACT:** William Page, Staff Personnel Program Analyst  
(916) 445-9801  
Fax: (916) 322-3769  
Email: WilliamPage@DPA.CA.GOV

This memo provides information regarding a limitation of retroactive dental premium reimbursements, in accordance with the recent regulation amendments which limit reimbursement of health premiums (See CalPERS Circular Letter, 600-215-05, dated April 29, 2005). The following changes will impact all mandatory cancellations and/or deletions to employees' State-sponsored dental coverage.

***Effective January 1, 2006, retroactive premiums for mandatory cancellations and/or deletions to employees' dental coverage will be reimbursed for a maximum period of six months.*** Personnel Offices should communicate the importance of submitting dental enrollment changes to their departments in a timely manner. Personnel Offices may also want to refer employees to the Dental Benefits Handbook for Active and Retired Employees on DPA's Web site at [www.dpa.ca.gov](http://www.dpa.ca.gov) (click on Benefits, then click on Dental Insurance, under Related Publications). To assist you in communicating information regarding the limitation of retroactive dental premium reimbursements, we have provided you with a memo (Attachment II) that should be distributed to all your employees.

**COMPLETING THE DENTAL PLAN ENROLLMENT AUTHORIZATION (STD. 692)**

When completing the Dental Plan Enrollment Authorization (STD. 692) for mandatory cancellations and/or deletions of coverage, the Personnel Office should continue to reflect the actual permitting event date that caused the loss of eligibility and the mandatory effective date/pay period, and forward the form to the State Controller's Office (SCO) for processing. When the form is processed by SCO, the premiums will be adjusted for a maximum period of six months.

The following example of how SCO will process a retroactive transaction is based on an employee who had a divorce (mandatory deletion of spouse) on 08/04/04, but did not report the divorce to the Personnel Office until 08/05/06.

Example: STD. 692 signed by Personnel Office:	08/05/06
STD. 692 received at SCO:	08/11/06
Effective date shown in Section E-14 on STD. 692:	09/01/04
Six month retroactive effective date on SCO records:	Ex-spouse deleted 03/01/06 (02/06 pay period)

The department and employee will not be able to recover any premiums paid prior to the 03/01/06 retroactive effective date (02/06 pay period). Additionally, the employee may be responsible for any dental services that have been incurred by the ex-spouse from 03/01/06 through 09/01/06 and any services incurred after the deletion is processed (if the ex-spouse continues to use this coverage).

#### ***DENTAL PROGRAM PERMITTING EVENT CODES IMPACTED BY CHANGE***

Attachment I lists the dental program permitting event codes that will have a six month limitation of retroactive dental premium reimbursements when the STD. 692 is processed by SCO.

#### ***IMPACT ON VISION ENROLLMENT***

State employees' vision coverage is automatically established for eligible employees and their eligible dependents and no form is required to delete ineligible dependents. Therefore, employees need to continue to ensure that only eligible dependents are provided services under their State-sponsored vision plan.

#### ***PERSONNEL OFFICES***

Please ensure that your employees are made aware of this change and the importance of making timely deletions of ineligible dependents to their dental coverage. Thank you for your cooperation. If you have any questions regarding this information, you may contact William Page, Staff Personnel Program Analyst, at (916) 445-9801.

/s/Debbie Endsley

Debbie Endsley, Division Chief  
Benefits Division

Attachment